Supreme Court, U.S.
FILED
JUL 13 1993
OFFICE OF THE CLERK

(2)

NO. 92-2005

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM E. GLEASON,
Petitioner

-vs-

STATE OF OHIO,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP D. BOGDANOFF
Assistant Prosecuting Attorney
53 University Avenue
Akron, Ohio 44308
(216) 643-2791
Counsel for Petitioner

THEODORE CHUPARKOFF
Attorney for Petitioner
333 South Main Street
Suite #501
Akron, Ohio 44308
(216) 376-2156

BEST AVAILABLE COPY

44 pp

QUESTIONS PRESENTED FOR REVIEW

Do the police have to inform a Defendant's wife of all of the objects of their search in order for the Defendant's wife to properly consent to a search of her home.

TABLE OF CONTENTS

	PAGE(S)
Questions Presented.....	1a
Table of Authorities.....	1c
Statement of the Case.....	2
Statement of the Facts.....	3
Summary of Arguments.....	6
Argument I.....	7
Conclusion.....	18
Appendix.....	19
United States Constitution Amendment IV.....	20

Unreported Case

State v. Eglin,
Summit Nos. 11168/11201,
Ninth Judicial District
(12/21/83).....21-40

TABLE OF AUTHORITIES

CASES CITED	PAGE(S)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....	9
State v. Childress, 4 Ohio St. 3d 217 (1983).....	9
State v. Eglin, Summit Nos. 11168/11201, Ninth Judicial District (12/21/83).....	13
State v. Morris, 48 Ohio App. 3d 137 (1988)...	9
CONSTITUTIONS	
Amendment IV.....	9

STATEMENT OF THE CASE

The Respondent agrees with the procedural posture set forth by the Petitioner but sets forth the following statement of the facts.

STATEMENT OF THE FACTS

On November 4, 1991, Detective Jennifer Limbert of the Summit County Sheriff's Office had a capias to arrest the Petitioner for four counts of Rape and four counts of Gross Sexual Imposition. At 6:50 a.m., Detective Limbert, Detective John Karabatsos and a uniformed officer went to 3749 Cottage Grove in Green Township, the residence of the Petitioner. After the detectives entered the Petitioner's residence they spoke to Marsha Gleason, the Petitioner's wife. Mrs. Gleason informed the Sheriff's detectives that the Petitioner was not home. The detectives told Mrs. Gleason that her husband was being arrested for the rape of certain minor children. The Detectives explained to Mrs. Gleason that they had interviewed the minor victims in this case and they indicated

that they had seen certain pornographic 8 millimeter movie films, pornographic comic books, and that nude pictures had been taken of them. After explaining the rape charges to Mrs. Gleason, Mrs. Gleason indicated she had nothing to hide and told the Sheriff's detectives that they could search her house. Mrs. Gleason signed a consent to search form before the detectives searched the Petitioner's house. Prior to signing the form, the detective specifically told Mrs. Gleason that she had the right not to allow the search of her home. The Sheriff's detectives subsequently searched the home of the Petitioner specifically limiting the search to the area were the children indicated the items could be found.

While the police were searching the Petitioner's house, the Petitioner called and spoke to the Sheriff's

detectives and arranged to turn himself in. During the conversation with the Petitioner, he never told the detectives to stop searching his house and Mrs. Gleason never stopped or limited the search of the house by the Sheriff's detectives. Mrs. Gleason testified for the defense and admitted that she signed the consent to search form. Mrs. Gleason indicated that she was intimidated by the fact that there were three people in her house at 7:00 a.m. in the morning and that she did not know what was going on.

SUMMARY OF ARGUMENTS

ARGUMENT I

THE POLICE DO NOT HAVE TO INFORM A DEFENDANT'S WIFE OF ALL OF THE OBJECTS OF THEIR SEARCH IN ORDER FOR THE DEFENDANT'S WIFE TO PROPERLY CONSENT TO A SEARCH OF HER HOME.

ARGUMENT I

THE POLICE DO NOT HAVE TO INFORM A DEFENDANT'S WIFE OF ALL OF THE OBJECTS OF THEIR SEARCH IN ORDER FOR THE DEFENDANT'S WIFE TO PROPERLY CONSENT TO A SEARCH OF HER HOME.

The Petitioner contends the police search in this case was improper because the police used deceptive tactics in obtaining consent to search the home. The State contends the police search of Petitioner's house was proper since the Petitioner's wife signed a consent form to search the house. In the case at bar, the Petitioner had been secretly indicted for the rapes of two children and Summit County detectives had a warrant for the Petitioner's arrest. The two child victims had told the detectives that the Petitioner had shown them 8 millimeter movies of teenagers performing sexual acts. The children also stated that the Petitioner would show them pornographic magazines and

comic books. The children indicated the Petitioner took nude snapshots of them. Finally, the children indicated where these items could be found. When the police arrived at Petitioner's home, they told Mrs. Gleason about the children's rape allegations and the names of the children. The detectives asked Mrs. Gleason if they could search her house for evidence including pictures of the children. The detectives did not explicitly tell Mrs. Gleason what other evidence they sought. They did inform Mrs. Gleason that she had the right to refuse a search of her house. Mrs. Gleason told the detectives she had nothing to hide and permitted the detectives to search her house. She then signed a consent to search form. The detectives then searched for nude photographs of the children and other evidence based upon the children's statements.

In order to determine whether a persons Fourth Amendment Rights have been violated, a person must give consent which is voluntary under the totality of the circumstances. State v. Childress, 4 Ohio St. 3d 217 (1983), Schneckloth v. Bustamonte, 412 U.S. 218 (1973). A person may give valid consent even if the person is not informed that he or she has a right to refuse to consent. State v. Morris, 48 Ohio App. 3d 137 (1988). Bustamonte at 249.

Here, the trial court ruled that Mrs. Gleason's consent was involuntary because the police did not inform her of all of the evidence they sought in their search:

> Officer Limbert testified that they did not obtain a search warrant because the police felt "they had a time problem." The Court construed this to mean that a

neutral magistrate would refuse to issue a search warrant for the materials seized as no probable cause existed to believe such items would still be in the Defendant's home in the places indicated by the children after the passage of so many years.

The officers hoping such items would still be located in the Defendant's home mislead the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant.

Even though Mrs. Gleason signed a consent form to conduct a complete

> search of the property, such was limited to a search for photographs. Since the search exceeded the consent given, the consent was not freely and voluntarily given and the items taken must therefore be suppressed.
>
> (Trial Court's Findings, p. 3-4).

The Ninth District Court of Appeals reversed the trial court's decision stating as follows:

> The court stated that the officers misled Mrs. Gleason into believing they were only looking for photographs involving the children. The subjective intent of the officers as to what they were searching for when they asked for consent to search the house is immaterial however. United States v. White (C.A. 7, 1983), 706 F.2d 806, 808. The

proper standard is not the "subjective intent" of the officers but rather "a standard of objective reasonableness without regard to the underlying intent or the motivation of the officers involved." Id. citing Scott v. United States, 436 U.S. 128, 56 L.Ed.2d 168.

Applying this standard, we find no violation of the Fourth Amendment. Even with a finding that Mrs. Gleason consented only to a search for pictures, the search reasonably included looking in the basement and closet, where the seized items were found . In the search for pictures, the closet would have been opened and the basement would have been searched. See White, supara. Since the officers could reasonably consider that the pictures were in

> the places where the seized items were found, the search was within the scope of Mrs. Gleason's consent. Id. See, also, United States v. Scherer (C.A. 7, 1982, 673 F.2d 176, 182, certiorari denied (1982), 457 U.S. 1120, 73 L.Ed.2d 1334.2
>
> We, therefore, find that the court erred in granting the motion to suppress. The assignment of error is well taken.

The State contends the Sheriff's detectives do not have to inform Mrs. Gleason of all of the objects of their search in order for her consent to be voluntary. In State v. Eglin, Summit Nos. 11168/11201, unreported, Ninth Judicial District (12/21/83), the police went to the Defendant's home in order to speak to the Defendant regarding a murder. When the police entered the

Defendant's home, the Defendant's father stated the Defendant was not home but that the police were free to look around. The police later found the Defendant and incriminating evidence in his bedroom. The Defendant contended his father's consent to search was not voluntary because the police did not inform the Defendant's father of the reason for their visit. This court rejected the argument finding that the consent was voluntary as long as it was not the product of coercion:

> Petitioner argues that the consent of Mr. Eglin was not voluntary as he was not informed of the reason for the officers' visit. However, the Supreme Court has made clear that voluntariness of consent is not to be tested in terms of waiver, i.e. whether the consent was knowingly and

> intelligently. Rather, voluntariness is found where, from the totality of the circumstances, it appears that the consent was not the product of governmental coercion. Schneckloth v. Bustamonte, supra. In the instant case, the officers simply requested to speak with defendant. In response, Mr. Eglin freely invited the police to look around. Under these circumstances, the trial court could reasonably conclude that Mr. Eglin's consent was voluntary and not coerced.

Here, the Sheriff's detectives did not use coercion to obtain the consent of Mrs. Gleason to search the Petitioner's house. The record indicates the detectives told Mrs. Gleason about her husband's charges and

asked her permission to search the house. Mrs. Gleason consented to a search of her house and signed a consent to search form. The police testified that they told Mrs. Gleason she had the right to refuse the consent search. The consent form also indicates Mrs. Gleason had the right to refuse to consent to the search. The consent in this case was voluntarily made. The Petitioner argues that the police deceived Ms. Gleason because they only told her they were looking for sexual photographs of children. However, the police did inform Ms. Gleason of the charges against her husband. Further, the State finds little difference between pornographic photos or pornographic films and comic books. The police did not use deception to obtain Ms. Gleason's consent to search in this case. Finally, the Sheriff's detectives

did not exceed the scope of the consent given by Mrs. Gleason. The search in this case was proper. The Petitioner's argument is without merit and must be overruled.

CONCLUSION

Pursuant to the argument offered, the Respondent respectfully contends that Petitioner's petition for a Writ of Certiorari shoiuld be denied, the Petitioner having presented no substantial constitutional issue, nor has any prejudicial error been demonstrated in the trial court proceedings.

A P P E N D I X

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATE OF OHIO)		IN THE COURT OF
)	ss:	APPEALS
COUNTY OF SUMMIT)		NINTH JUDICIAL DISTRICT
		C.A. NOS. 11168/ 11201
STATE OF OHIO)		APPEAL FROM
)		JUDGMENT ENTERED
Plaintiff-Appellee)		IN THE COMMON
)		PLEAS COURT
-vs-)		COUNTY OF SUMMIT,
)		OHIO CASE NO.,
JEFF PHILIP EGLIN)		CR 82 10 1201
)		
Defendant-Appellant)		

DECISION AND JOURNAL ENTRY

Dated: December 21, 1983

This cause was heard October 17, 1983, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

QUILLIN, P. J.

Defendant Jeff Eglin appeals from a conviction for the crimes of aggravated murder and aggravated burglary. We affirm.

As the evidence is conflicting, we note that in reviewing the facts we must construe the evidence in the light most consistent with the judgment. 5 Ohio Jurisprudence 3d 129, Appellate Review, Section 563.

On September 2, 1982, the Akron Police Department received a report that an 84 year old woman was found dead in her home. The discovery was made by a friend of the victim. Investigation indicated that the victim had been strangled and stabbed.

Discussions with witnesses revealed that in the early evening of September 1, 1982, a young man was seen with the victim at her home. The young man was described as wearing a windbraker type

jacket, faded blue jeans, and a red bandana. He was seen smoking a cigarette with a brown wrapper. Later, the police received an anonymous telephone call stating that defendant had been bragging about robbing and murdering an older woman. The police then checked the juvenile files and discovered that defendant had a history of burglary offenses in the area of the victim's home. Furthermore, defendant's residence was only a few blocks away from that of the victim.

Based on this information, several officers proceeded to defendant's home at approximately 11:30 p.m. Upon arriving they knocked on the door which was answered by defendant's sister-in-law. The officers requested to speak with defendant and were informed that he was not home. At that moment, Mr. Eglin, defendant's father, appeared at

the door. The police again asked to speak with defendant. Mr. Eglin replied that defendant was not home but that the police were free to look around. Responding to a request by the police, Mr. Eglin led them to defendant's bedroom. The police knocked on the bedroom door which was locked. After the police knocked a second time, defendant answered that he was trying to unlock the door. Then, one of defendant's brothers arrived with a key and opened the door. The officers entered the room where they observed defendant putting on a pair of faded blue jeans and rummaging through his sheets. The officer saw in plain view a red bandana, a box of More cigarettes (noted for their brown, as opposed to white, wrapper) and a knife. They further found under defendant's mattress, a wallet stuffed with an extraordinarily large amount of money.

Based on these observations, the officers suggested that defendant come to the detective bureau for questioning concerning a felony under investigation. Both defendant and his father stated that would be fine. Defendant requested to use the bathroom but headed toward another door. The officers then placed handcuffs on defendant as they feared he might attempt to flee.

Defendant was transported to the police station. While in the police cruiser, defendant was read his Miranda rights for the first of several times. At the police station, defendant was questioned about the incident for about an hour. Later, he was taken to the Juvenile Detention Center.

On September 3, 1982, at approximately 3:00 p.m., defendant was returned to the police station. After more interrogation, defendant confessed

to the murder. In the confession, defendant also disclosed that he had stolen some silverware. He then told the police that it was hidden in the attic of his home. The police returned to the Eglin residence and while there defendant's brother retrieved the silverware and gave it to the officers. The police later returned and conducted a more thorough search of the premises with the consent of defendant's mother.

Defendant, being 17 years of age, was brought before the juvenile court which ordered him to be prosecuted as an adult. On November 16, 1982, defendant was indicted on one count of aggravated murder and one count of aggravated burglary. A jury found him guilty of both offenses and he was sentenced by the court.

ASSIGNMENTS OF ERROR

"I. The court erred in denying the appellant's motion to suppress the evidence illegally seized at the time of his arrest in direct contravention of his statutory rights. The fourth Amendment rights under the United States Constitution. The Ohio Constitution.

"II. The court committed error when seized evidence was not suppressed at appellant's trial when the seizures flowed from an illegal arrest and without probable cause or warrant.

IV. The court erred in its 'finding and order' in overruling defendant-appellant's motion to suppress by declaring that the results of the search created probable cause where none had previously existed."

Prior to trial, defendant moved to suppress those items seized from the Eglin home. This motion was denied. As each of the above assignments of error deal with the motion to suppress, they will be considered together.

It is necessary to examine each step of police activity in chronological order to determine the validity of the ultimate seizure.

The initial presence of the police in the Eglin home was not without authorization. The officers were specifically invited by defendant's father to "look around" the house in search of defendant. Thus, the initial search was based upon the consent of one authorized to get it. Schneckloth v. Bustamonte (1973), 412 U.S. 218.

Defendant argues that the consent of Mr. Eglin was not voluntary as he was not informed of the reason for the

officers' visit. However, the Supreme Court has made clear that voluntariness of consent is not to be tested in terms of waiver, i.e. whether the consent was given knowingly and intelligently. Rather, voluntariness is found where, from the totality of the circumstances, it appears that the consent was not the product of governmental coercion. Schneckloth v. Bustamone, supra. In the instant case, the officers simply requested to speak with defendant. In response, Mr. Eglin freely invited the police to look around. Under these circumstances, the trial court could reasonably conclude that Mr. Eglin's consent was voluntary and not coerced.

Once inside the house the police queried as to the location of defendant's bedroom. Mr. Eglin responded by leading the police to the room. As the police entered defendant's

room, they saw in plain view the items described to the earlier. Police officers may seize clearly incriminating evidence which is discovered in a place where the officers are lawfully present. Washing v. Chrisman (1982), 455 U.S. 1; Coolidge v. New Hampshire (1971), 403 U.S. 443. Thus, as defendant concedes, the items found in plain view were admissible at trial.

More important than the seizure of these items is the information they provided the police. Probable cause to arrest exists when the facts and circumstances within the knowledge of the police are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense. Beck v. Ohio (1964), 379 U.S. 89. The Supreme Court has held that items discovered in plain view may be relied upon to provide probable cause

to arrest. Colorado v. Bannister (1980), 449 U.S. 1. Thus, the discovery of the previously described bandana, distinctive cigarettes, and knife taken along with the earlier telephone call provided the probable cause necessary to arrest defendant. Whiteley v. Warden (1971), 401 U.S. 560, 567.

Having probable cause to arrest defendant, the police were justified in searching the immediate surroundings. Chimel v. California (1969), 395 U.S. 752.

All subsequent searches of the Eglin residence were performed upon the consent of one authorized to give it. Schneckloth v. Bustamonte, supra.

From the foregoing, we find that the motion to suppress was properly overruled.

ASSIGNMENT OF ERROR
III

"The court erred in not suppressing appellant's statements made to the police after they flowed from an unlawful arrest and were induced under such conditions to render the statements constitutionally impermissible."

Defendant argues under this assignment of error that his confession, being improperly induced, should have been suppressed.

Throughout the interrogation process, defendant was advised of his constitutional rights no fewer than four times. Each time he stated that he understood his rights and was willing to waive them.

The totality of the circumstances must be considered when determining the voluntariness of a confession. State v. Barker (1978), 53 Ohio St. 2d 275, Syl. 2.

Defendant argues that as a minor, he is to be afforded special protection in the interrogation process. However, such added protection varies according to factors such as age, mental capacity, etc. State v. Bell (1976), 48 Ohio St. 2d 270, 277. Defendant was adjudicated competent to stand trial as an adult, and thus not entitled to as much protection as a very young child who is not capable of intelligently waiving his rights. State v. Bell, supra.

Defendant claims that he was intoxicated and highly fatigued during the interrogation. However, his confession came after he had been in custody for over 18 hours. The effects of any intoxicating substances which may have been consumed by defendant were certainly dissipated by then. As for fatigue, any such fatigue on the part of defendant was not the result of police

practice. For much of the time defendant was in custody, he was in a holding cell at the Juvenile Detention Center. There is no indication that he was not free to sleep there had he felt the need.

Based on the totality of the circumstances, it can only be concluded that defendant's confession was voluntarily given.

ASSIGNMENT OF ERROR
V

"The trial court erred in finding prior to trial, that the defendant, upon motion of the state, was under the age of eighteen, and could not be put to death upon conviction and therefore was not entitled to the statutory procedures guaranteed by the Ohio Revised Code, thereby denying defendant a fair jury."

Prior to jury selection, the court determined that since defendant was a minor, he would not be subject to the death penalty. Accordingly, the court ruled that voir dire could not contain questions concerning the views of the veniremen on the death penalty.

There is little question that aggravated murder is a capital offense even where the death penalty is unavailable. State v. Henry (1983), 4 Ohio St. 3d 44. However, where the death penalty is not to be considered by the jury and the jury is so instructed, the court may refuse questioning of the veniremen on that issue. State v. Davis (1978), 56 Ohio St. 2d 51; State v. Wade (1978), 53 Ohio St. 2d 182; and State v. Lane (1976), 49 Ohio St. 2d 77. In the instant case the court instructed the jury that the death penalty was not being sought by the state and could not

be considered by the jury. In light of this instruction, the court's ruling was not erroneous.

ASSIGNMENT OF ERROR
VI

"Defendant was denied his right to a speedy trial."

When a juvenile is charged with committing a felony, the time for a speedy trial pursuant to R.C. 2945.71 does not commence until the case is transferred to the grand jury for further proceedings against the defendant as an adult. State v. ex rel. Williams, v. Court of Common Pleas (1975), 42 Ohio St. 2d 433. Thus, the speedy trial time for defendant here did not begin to run until October 12, 1982, the date of transfer to the grand jury.

Defendant concedes that, pursuant to psychological evaluation, the time was tolled between November 29, 1982,

and March 1, 1983. Trial having commenced on April 5, 1983, defendant was brought to trial well within the 90 day time limit.

ASSIGNMENT OF ERROR
VII

"The court erred in allowing the jury to rehear the defendant's taped confession after being unable to reach a verdict."

The question of whether to permit the jury to review evidence after the jury has retired rests within the sound discretion of the trial court. State v. Berry (1971), 25 Ohio St. 2d 255, Syl. 4; and State v. Rollins (1976), 49 Ohio App. 2d 330.

As we have determined that defendant's taped confession was admissible, we fail to find a prejudicial abuse of discretion in permitting the jury to hear the confession a second time.

ASSIGNMENT OF ERROR
VIII

"The verdict of the jury was against the manifest weight of the evidence an should be overturned."

Judgments supported by substantial evidence upon which a jury could reasonably conclude beyond a reasonable doubt that all the elements of a crime have been proven will not be overturned as being against the manifest weight of the evidence. State v. Eley (1978), 56 Ohio St. 2d 169.

A review of the evidence, including defendant's confession, indicates substantial evidence to support the jury's verdict.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common

Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

_____
Presiding Judge
-for the Court-

MAHONEY, J.
GEORGE, J.
CONCUR

APPEARNCES:

LYNN SLABY, Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308 for Plaintiff.

MICHAEL G. WOLFF, Attorney at Law, 12 E. Exchange St., 6th Floor, Akron, OH 44308 for Defendant.